

## § 137.326

(b) Upon receiving a Self-Governance Tribe's request to enter into a pre-negotiation phase the Secretary shall take the steps outlined in section 105(m)(3) of the Act [25 U.S.C. 450j(m)(3)].

### **§ 137.326 What must a Tribal proposal for a construction project agreement contain?**

A construction project proposal must contain all of the required elements of a construction project agreement as defined in § 137.280. In addition to these minimum requirements, Self-Governance Tribes may propose additional items.

### **§ 137.327 May multiple projects be included in a single construction project agreement?**

Yes, a Self-Governance Tribe may include multiple projects in a single construction project agreement proposal or may add additional approved projects by amendment(s) to an existing construction project agreement.

### **§ 137.328 Must a construction project proposal incorporate provisions of Federal construction guidelines and manuals?**

(a) No, the Self-Governance Tribe and the Secretary must agree upon and specify appropriate building codes and architectural and engineering standards (including health and safety) which must be in conformity with nationally recognized standards for comparable projects.

(b) The Secretary may provide, or the Self-Governance Tribe may request, Federal construction guidelines and manuals for consideration by the Self-Governance Tribe in the preparation of its construction project proposal. If Tribal construction codes and standards (including national, regional, State, or Tribal building codes or construction industry standards) are consistent with or exceed otherwise applicable nationally recognized standards, the Secretary must accept the Tribally proposed standards.

### **§ 137.329 What environmental considerations must be included in the construction project agreement?**

The construction project agreement must include:

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(a) Identification of the Tribal certifying officer for environmental review purposes,

(b) Reference to the Tribal resolution or equivalent Tribal action appointing the Tribal certifying officer and accepting the jurisdiction of the Federal court for enforcement purposes as provided in §§ 137.310 and 137.311.

(c) Identification of the environmental review procedures adopted by the Self-Governance Tribe, and

(d) An assurance that no action will be taken on the construction phase of the project that would have an adverse environmental impact or limit the choice of reasonable alternatives prior to making an environmental determination in accordance with the Self-Governance Tribe's adopted procedures.

### **§ 137.330 What happens if the Self-Governance Tribe and the Secretary cannot develop a mutually agreeable construction project agreement?**

The Self-Governance Tribe may submit a final construction project proposal to the Secretary. No later than 30 days after the Secretary receives the final construction project proposal, or within a longer time agreed to by the Self-Governance Tribe in writing, the Secretary shall review and make a determination to approve or reject the construction project proposal in whole or in part.

### **§ 137.331 May the Secretary reject a final construction project proposal based on a determination of Tribal capacity or capability?**

No, the Secretary may not reject a final construction project proposal based on a determination of Tribal capacity or capability.

### **§ 137.332 On what basis may the Secretary reject a final construction project proposal?**

(a) The only basis for rejection of project activities in a final construction project proposal are:

(1) The amount of funds proposed in the final construction project proposal exceeds the applicable funding level for the construction project as determined under sections 508(c) [25 U.S.C. 458aaa–

7(c)] and 106 of the Act [25 U.S.C. 450j-1].

(2) The final construction project proposal does not meet the minimum content requirements for construction project agreements set forth in section 501(a)(2) of the Act [25 U.S.C. 458aaa(a)(2)]; and

(3) The final construction project proposal on its face clearly demonstrates that the construction project cannot be completed as proposed.

(b) For construction programs proposed to be included in a construction project agreement, the Secretary may also reject that portion of the proposal that proposes to assume an inherently Federal function that cannot legally be delegated to the Self-Governance Tribe.

**§ 137.333 What procedures must the Secretary follow if the Secretary rejects a final construction project proposal, in whole or in part?**

Whenever the Secretary rejects a final construction project proposal in whole or in part, the Secretary must:

(a) Send the Self-Governance Tribe a timely written notice of rejection that shall set forth specific finding(s) that clearly demonstrates, or that is supported by controlling legal authority supporting the rejection;

(b) Within 20 days, provide all documents relied on in making the rejection decision to the Self-Governance Tribe;

(c) Provide assistance to the Self-Governance Tribe to overcome any objections stated in the written notice of rejection;

(d) Provide the Self-Governance Tribe with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter and the opportunity for appeal of the decision to reject the final construction contract proposal, under the regulations set forth in subpart P of this part, except that the Self-Governance Tribe may, in lieu of filing an appeal, initiate an action in Federal district court and proceed directly under sections 511 [25 U.S.C. 458aaa-10] and 110(a) of the Act [25 U.S.C. 450m-1(a)]. With respect to any hearing or appeal or civil action conducted pursuant to this section, the Secretary shall have

the burden of demonstrating by clear and convincing evidence the validity of the grounds for rejecting the final construction project proposal (or portion thereof); and

(e) Provide the Self-Governance Tribe with the option of entering into the severable portions of a final proposed construction project agreement (including a lesser funding amount) that the Secretary did not reject, subject to any additional alterations necessary to conform the construction project agreement to the severed provisions. Exercising this option does not affect the Self-Governance Tribe's right to appeal the portion of the final construction project proposal that was rejected by the Secretary.

**§ 137.334 What happens if the Secretary fails to notify the Self-Governance Tribe of a decision to approve or reject a final construction project proposal within the time period allowed?**

If the Secretary fails to notify the Self-Governance Tribe of the decision to approve or reject within 30 days (or a longer period if agreed to by the Self-Governance Tribe in writing), then the proposal will be deemed approved by the Secretary.

**§ 137.335 What costs may be included in the budget for a construction agreement?**

(a) A Self-Governance Tribe may include costs allowed by applicable OMB Circulars, and costs allowed under sections 508(c) [25 U.S.C. 458aaa-7(c)], 106 [25 U.S.C. 450j-1] and 105 (m) of the Act [25 U.S.C. 450j(m)]. The costs incurred will vary depending on which phase of the construction process the Self-Governance Tribe is conducting and type of construction project agreement that will be used.

(b) Regardless of whether a construction project agreement is fixed price or cost-reimbursement, budgets may include costs or fees associated with the following:

(1) Construction project proposal preparation;

(2) Conducting community meetings to develop project documents;

(3) Architects, engineers, and other consultants to prepare project planning documents, to develop project plans